CONSENT IN LARCENCY. — The question, what constitutes consent in larceny, has again been passed upon in Great Britain. The answer has been in the air since the cases of *Reg.* v. *Ashwell*, 16 Q. B. D. 190 (1885), and *Reg.* v. *Flowers*, 16 Q. B. D. 643 (1886). In the first of these cases B. gave A. a sovereign, both supposing it a shilling. When A. discovered the mistake, he kept the money, was convicted of larceny, and by an evenly divided court, this conviction was affirmed. Less than three months later the same court, on substantially the same facts, unanimously quashed a similar conviction in *Reg.* v. *Flowers*. These decisions were reviewed in a discussion of Consent in the Criminal Law, by Prof. J. H. Beale, Jr., 8 Harvard Law Review, 317, and have elsewhere excited considerable controversy; so that the recent case of *Reg.* v. *Hehir*, 29 Ir. L. T. 323, which settles the law for Ireland, is of no little interest. A £10 note was mistaken for a £1 one under circumstances similar to those of *Reg.* v. *Ashwell*, and by a vote of five to four the latter case was expressly disregarded, and a conviction quashed. This decision, coupled with *Reg.* v. *Flowers*, which, however, assumed to distinguish *Reg.* v. *Ashwell*, renders it very doubtful whether *Reg.* v. *Ashwell* would be followed even in England. The Irish court certainly seems to do less violence to any logical theory of consent.

INTERSTATE COMMERCE AGAIN.— The vexed topic of interstate commerce control has cropped up again. In both *Swift* v. *P. & R. R. Co.*, 64 Fed. Rep. 59, per Grosscup, J., and in *Gatton* v. *C., R. I. & P. R. Co.*, 63 N. W. Rep. 589, per Kinne, J., it is held that in the absence of legislation by Congress, excessive charges paid for carriages of goods from one State to another cannot be recovered by the shipper. The plaintiff's right to recover depended on the existence of a State common law controlling interstate commerce, or of a federal common law. The existence of either was denied. Such a doctrine would seem to mean that in the absence of legislation by Congress our courts are powerless to enforce the common-law liabilities of interstate carriers, and must leave the public at their mercy, for it appears to follow logically, as was pointed out by Shiras, J., in *Murray* v. *C. & N. W. R. Co.*, 62 Fed. Rep. 24, 37, that it is "open to all common carriers engaged in interstate commerce to act as they please in regard to accepting or refusing freights, in regard to the prices which they may charge, the care they shall exercise, and the speed with which they shall transport and deliver the property placed in their charge." [See also 7 Harvard Law Review, 488, and 8 Harvard Law Review, 168.] The shippers have only the right to enforce contracts, and even in regard to making contracts, the interstate carriers are absolved from the common-law restrictions governing the contracts of common carriers.

It is not disputed that before the adoption of the Constitution the various States could enforce the common-law liabilities and duties of carriers engaged in interstate commerce. The moot point is the effect of the adoption. The view necessarily involved in the cases under discussion is that the control of interstate commerce by State common law was destroyed, and accordingly that until some Act of Congress no tribunal could enforce the common-law liabilities of interstate carriers. On the other hand, it has been held that the Constitution adopted a federal common law, which took the place of State common law on questions of interstate commerce, and was supreme until in turn superseded by Act

of Congress. As to the existence of a federal common law, however, authorities are as widely at variance as ever. The adherents of its existence from Du Ponceau down are at least equally matched by its opponents [see authorities collected in 63 N. W. R. 589, *supra*]. If, then, the existence of a federal common law is not firmly enough established to afford escape from the results of the doctrines of the principal cases, escape may still be found in controverting the view that the power to control interstate commerce, which was reserved to Congress by the Constitution, excludes, even before legislation, the State common law on the subject. There is a possibility that this contention may prevail.

The exclusiveness of the power of Congress to control depends, according to the test given in *Cooley* v. *Wardens*, 12 How. 299, on whether the nature of the matters to be controlled makes necessary a uniform rule throughout the States. Accordingly States may pass bankruptcy laws in the silence of Congress on the subject; but not statutes controlling interstate commerce [*Wabash Ry.* Co. v. *Illinois*, 118 U. S. 557]. The above test, at first thought final and confidently applied, has been more recently questioned, and the tendency of the United States Supreme Court is toward a greater hesitancy to discover the necessity of a uniform rule [2 Thayer's Cases on Const. Law, 2190, note]. In fact, though the last decided cases on the point are hostile to any control by the states of interstate commerce in the absence of congressional legislation, it would not be suprising to see the law circle back to the position taken by Matthews, J., in the case of *Smith* v. *Alabama*, 124 U. S. 465. He stated that the duties and liabilities of interstate carriers, before Act of Congress, are enforceable only under State common law, and "the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law." Certainly, the last word on this confused subject is far from said.

RECENT CASES.

AGENCY — INSURANCE POLICY ISSUED BY INTERESTED PARTY. — Defendant company's agent, who issued an insurance policy to the plaintiff corporation, was a stockholder and officer in that corporation. On that ground defendant company refused to pay plaintiff corporation's loss for the recovery of which this action is brought. *Held*, that the defendant company is justified in his refusal to be bound by the policy. *Greenwood Ice & Coal Co.* v. *Georgia Home Ins. Co.*, 17 So. Rep. 83 (Miss.).

This decision seems clearly right and in accord with authority. *New York Central Ins. Co.* v. *National Protection Ins. Co.*, 14 N. Y. 85. The agent for the one party appears from the statement of facts to have been in effect the agent of the other also, and this relation of parties cannot exist, owing to the antagonistic interests represented. The exception made in the case of auctioneer's clerks does not apply here, as in that case the clerk is agent for a simple ministerial purpose, and it is a custom well understood by all parties concerned. In general, an agent for one party cannot act in the same transaction for the other party, and in such a case the contract is voidable. 1 Biddle on Insurance, § 497.

BANKS AND BANKING — INSOLVENCY OF COLLECTING BANK — TRUST FUNDS. — A bank received a note for collection and remittance, but, instead of remitting, credited its correspondent with the proceeds, and three days later failed. At the time of failure the cash on hand was less than the amount collected, but the receiver realized from the assets enough to pay all preferred claims. *Held*, plaintiff has a lien on cash on hand